



REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 387 OF 2020

BETWEEN:

SIYANI LAMBULIRA.....CLAIMANT

AND

FLOURIDE CEMENT COMPANY LIMITED.....DEFENDANT

CORAM: WYSON CHAMDIMBA NKHATA (AR)

Mr. Kumpita- of Counsel for the Claimant

Mr. Amos- Court Clerk and Official Interpreter

ORDER ON ASSESSMENT OF DAMAGES

INTRODUCTION

The claimant suffered injury while under the employment of the defendant. The statement of case indicates that the defendant was at all material time a company registered in the Republic of Malawi. The claimant was working as a general labourer. On or about 5th December, 2018 he was in the course of duty pushing limestone into a machine using a stick and in the process the stick got caught in the machine and pulled his hand into the machine. Consequently, he lost two fingers and injured his right hand. He commenced this action against the Defendant claiming damages for pain and suffering, loss of amenities of life, damages for disfigurement, loss of earning capacity and costs of the action. The issue of liability was settled in favour of the claimant through a default judgment on 24th March, 2021. The matter was referred to this court for assessment of damages which I must now consider.

THE EVIDENCE

The matter came for assessment of damages on the 18th November 2021. The defendant did not pitch up for the hearing. There being evidence that they had been duly served, the court proceeded to hear the claimant on assessment of damages. The claimant was the sole witness for his case. He adopted his witness statement and tendered a Medical Report and a Police Report. In his witness statement, he averred that on or about 5th December, 2018 he was in the course of his duty of pushing limestone into a machine when the machine caught his hand and injured him severely. He was not provided with any protective equipment when he was working. He was compelled to work in a dangerous environment because the Defendant compelled him to use a stick which got caught in the machine and pulled his hand into the machine. Due to the impact, he sustained multiple cuts on the right hand, amputation of the left ring finger and suffered general body pains.

He further lamented that he is unable to do any manual work and to carry out farming activities. He showed the court where he was amputated and a protrusion where a finger had to assume a different location. He also stated that consequent to the injury his family is suffering. He explained that he has 6 children whom he can no longer fend for. He further explained that one of his children failed to proceed to secondary school due to lack of school fees. He also stated out that he has a large garden which he used to grow maize for subsistence and commercial purposes. He stated that he can no longer hold the hoe and carry out farming activities. He further stated that the injury has affected his health in that he no longer does exercises like push-ups which he used to do. Lastly, he stated that the hand injury has also affected his marriage in that he can no longer pleasure his wife as he used to do and that his marriage is no longer blissful.

Such was the evidence on assessment of damages. I would like to thank Counsel for the claimant for the guidance as evidenced by the well-researched submissions filed in support of the assessment of damages herein in which several authorities have been cited. This court has given the submissions and the authorities counsels cited the most anxious consideration.

THE LAW AND APPLICABLE LEGAL PRINCIPLES

On the law and principles governing assessment of damages, it is trite that the purpose of awarding damages is to compensate the injured party as nearly as possible as money can do. That is to say, to place the claimant in a position he would be had he not suffered the damage or loss. This is what is termed the principle of *restitutio intergrum*. It is not possible to quantify damages with exactitude. However, courts use comparable cases as a guide in coming up with a reasonable quantum of damages. See the case of **Kalinda –vs- Attorney General (1992) 15 MLR 170 at p 172**. The Court will also consider factors like

passage of time when the award was made, as well as the value of the kwacha at the time of making the award.

Pain and suffering

The word “pain” connotes that which is immediately felt upon the nerves and brain, be it directly related to the accident or resulting from medical treatment necessitated by the accident while “suffering” includes fright, fear of future disability, humiliation, embarrassment and sickness. See: **Ian Goldrein et al, Personal Injury Litigation, Practice and Precedents** (Butterworths, 1985) and **City of Blantyre vs. Sagawa**: [1993] 16(1) MLR 67 (MSCA). In **Sakonda vs. S.R. Nicholas**: Civil Appeal Cause No. 67 of 2013, it was highlighted that pain and suffering is attributable to the claimant's injury or to any necessary surgical operations and mental anguish.

The fundamental factor in assessing damages for pain and suffering was aptly put by the Supreme Court of Appeal in **Chidule vs. Medi**: Malawi Supreme Court of Appeal, Civil Appeal No. 12 of 1993, to say:

“In assessing damages for pain and suffering, the court must consider the pain which the particular plaintiff has suffered because the circumstances of the particular plaintiff are bound to have a decisive effect in the assessment of damages”.

The implication of the above statement is that, in principle and practice, each case must be dealt with according to its peculiar circumstances.

Loss of amenities of Life

Loss of amenities is attributable to deprivation of the claimant's capacity to engage in some sport or past-time which he/ she formerly enjoyed. Basing on the case of **Kanyoni vs. Attorney General**: [1990] 13 MLR 169. It means that he is incapable of performing some activities he used to do. Damages for loss of amenities of life are therefore awarded for the fact that the plaintiff is simply deprived of the pleasures of life, which amounts to a substantial loss, whether the plaintiff is aware of the loss or not. **Poh Choo vs. Camden and Islington Area Health Authority**: [1979] 2 All ER 91.

Disfigurement

Damages under the head of disfigurement are paid for the change in physical form of a person injured either as a result of the impact of the injury or its treatment, such as scar coming in as a result of surgical operation necessitated by the injury. It is a change in appearance but it is capable of limiting a person from doing certain things- see- **Francis Chikoti vs- United General Insurance Company Limited** Personal Injury Cause No. 730 of 2016.

COMPARABLE CASES

Basically, it is not possible to quantify such damages with mathematical precision. As a result, courts use decided cases of comparable nature to arrive at awards. That ensures some degree of consistency and uniformity in cases of a broadly similar nature: See **Wright -vs- British Railways Board** [1983] 2 A.C. 773, and **Kalinda -vs- Attorney General** [1992] 15 M.L.R. 170 at p.172. As such this court will have recourse to comparable cases to arrive at the appropriate quantum of damages for the claimant. In this case, the claimant claims to have he sustained multiple cuts on the right hand, amputation of the left ring finger and suffered general body pains. Counsel representing the claimant calls upon the court to consider the following cases for comparison:

- **Chisanga v Minomba and another** Personal Injury Cause No. 307 of 2011 (Unreported) wherein the plaintiff sustained severe soft tissue injury of left hand, deep cut wound on left forearm and injury to the left knee. His incapacitation was assessed at 15%. He was awarded MK600,000.00 for pain and suffering, loss of amenities of life and disfigurement. This award was made on 31st August 2012, Zomba.
- **Moses v Prime Insurance Company Limited** Civil Cause No. 1543 of 2008 (Unreported) wherein the Plaintiff sustained multiple cuts on right knee, deep cut on left leg, bruises on right hand and general body pains. He was awarded MK480,000.00 for pain and suffering. This award was made on 24th March, 2009, Blantyre.
- **Deepack Sharma vs. Zagafuk Transport and Charter Insurance Company Ltd Personal Injury Cause number 271 of 2014** wherein the High Court awarded the sum of MK 8,331,845.18 as compensation for pain and suffering, loss of amenities of life and disfigurement.

Counsel in his oral submission called upon the court to consider the case of **Richard Chinsinga v. Electricity Supply Corporation of Malawi, Personal Injury Case Number 58 of 2012 (HC)**, in which the claimant suffered burnt wounds on the neck which exposed the tendons, serious injuries on the eye, which led to an operation, very large burnt wounds on the left cheek, left ear and burnt wounds on the shoulder and underwent several surgical treatments which led to an amputation of his arm. He was awarded MK20,000,000.00 for pain and suffering, K5,000,000.00 for loss of amenities and K5,000,000.00 for disfigurement.

In view of the foregoing, Counsel representing the claimant prays for an award of MK10,000,000.00 for damages for pain and suffering and K10,000,000.00 loss of amenities of life.

DETERMINATION

The evidence emanating from the claimant indicates that he sustained multiple cuts on the right hand, amputation of the left ring finger and suffered general body pains. A visual assessment in court affirmed the injuries. However, the court observed that it was one finger actually missing but the other finger lost its position and was rendered useless. In my considered opinion, the injuries as outlined exposed the claimant to excruciating pain during the occurrence of the accident as well during recuperation. Other than that, the evidence indicates that he was subjected to painful medical and surgical procedures such as amputation. However, there is no evidence tendered which indicates that he continues to suffer pain save for the fact that the hand lost its versatility and he cannot use it anymore.

Other than pain and suffering, there is evidence as to the amenities of life that he has lost. He lamented in his testimony that he can no longer do exercises and this has heavily affected his health. He added that he can no longer pleasure his wife with his hand as he used to do and this has put his marriage on the rocks. Lastly, the issue of disfigurement was quite apparent. A finger was lost and another rendered useless having been removed from its normal position. This is something he will live with for the rest of his life. Sadly, the disfigurement can easily be seen. This court is aware that the general societal attitude towards disfigurement often causes psychological distress to disfigured individuals.

Turning to cases cited for comparison, the judgments I have been referred to are not on all fours with the case before me. The injuries sustained by the claimants in those judgments, the treatment administered and the consequences of such injuries are not similar to those in the present case and as such the amount of compensation would not necessarily be the same. Observably, the injuries focus on deep cut wounds and bruises. I am mindful of the fact that the injuries sustained by the claimants in those cases are more severe than in the current case. The circumstances are even dire in the Chinsinga case wherein the injuries are by far more serious than in the case herein. I am however satisfied that the general patterns in those cases are indicative of what courts would normally award in such circumstances. It has to be borne in mind that in cases in which the question of general damages comprising pain and suffering, disfigurement, permanent disability and loss of amenities of life arises a trial court in considering all the facts and circumstances of a case has a wide discretion to award what it considers to be fair and adequate compensation to the injured party.

In this instance, the court has to assume in the claimant's favour that he suffered pain during and immediately after the accident and that he suffered pain after the amputation and whilst recuperating from the various injuries which are common cause. I also have to assume in his favour that he has lost amenities of life detrimental to his health and marriage. There is no doubt that the claimant has suffered severe injuries and he must be fairly compensated. I am therefore of the view that when considering the injuries

sustained by the claimant and the general trend followed by courts in awarding damages, it would be fair and reasonable if he is awarded an amount of K4,500,000.00 under all heads of general damages claimed and proved.

Loss of earning capacity

The claimant is also claiming damages for loss of earning capacity. The same is calculated based on the annual figure and taking into account the age of the claimant and his working life span. It also takes into account the usual working contingencies and also taxation. Courts also assess the prospect of losing employment or reduced earnings in future - **Tembo v. City of Blantyre Civil Cause Number 1355 of 1994, High Court Principal Registry (unreported)**. Justice Mwaungulu, as he was a judge of the High Court then, in the case **Sakonda v. S.R. Nicholas Ltd, Civil Appeal Cause No. 67 of 2013, High Court Principal Registry (Unreported)** suggests that for loss of income, the real loss must be ascertainable and hence calculable for purposes of the award of damages, whilst a court can make an award for loss of earning capacity where the loss is not ascertainable.

In this case, there is no doubt that the claimant's pre-accident earning capacity has been reduced. He shall have difficulties competing favourably in the job market. To make matters worse he cannot resort to his farming activities as he used to do other than through engaging other people to cultivate for him. It is in evidence that he is unable to do manual work and that he is a laborer. Counsel calls upon the court to determine his loss of earning capacity by considering that the claimant is 37 years old and that the retirement age is 55. He is of the view that the claimant has lost the minimum wage for the next 18 years which translates to loss of earning capacity being $18 \text{ years} \times 12 \text{ months} \times \text{K}38,000.04 = \text{MK}8,208,008.64$.

Having considered the submissions by the claimant, I wish to agree with Counsel for the claimant in that 37 years old at the time of the accident, he could have worked way up to 55. I take it he still had about 18 years farming and doing his piece works. Nevertheless, I deduct it by half to cater for eventualities of life that may have reduced his capacity to earn and also mindful of the fact that it will be a one time payment which may be invested and that he was under an obligation to mitigate his loss. On the part of earnings, it is clear that the claimant's earnings could not be ascertained. In the circumstances, the court ought to use the minimum wage. Observably, Counsel for the defendants is of the view that the applicable minimum monthly wage be as at the date of accident which was MK38,000.04. I shall calculate loss of earning capacity thus: $9 \text{ years} \times 12 \text{ months} \times \text{K}38,000.04 = \text{MK}4,104,004.32$.

CONCLUSION

It is upon a thorough consideration of facts and circumstances of this case and upon an exhaustive consideration of the submissions by Counsel in the light of the relevant and applicable law regarding damages that this court awards the claimant as follows:

General damages - K4,500,000.00

Loss of earning capacity - K4,104,004.32

In total, the claimant is awarded **K8,604,004.32**. The claimant is further awarded costs for the assessment of damages proceedings to be taxed if not agreed by the parties.

DELIVERED IN CHAMBERS THIS 22ND DAY OF NOVEMBER 2021



WYSON CHAMDIMBA NKHATA

ASSISTANT REGISTRAR